Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the rule "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings," *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), abrogated when the initial failure to give the *Miranda* warnings was intentional?

PARTIES TO THE PROCEEDING

Petitioner, the state of Missouri, was the respondent below. Respondent, Patrice Seibert, was the appellant below.

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PETITION FOR WRIT OF CERTIORARI

The State of Missouri respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court in this case.

OPINIONS BELOW

The opinion of the Missouri Supreme Court reversing the trial court's judgment and sentence, filed December 10. 2002, and reported at 93 S.W.3d 700 (Mo. banc 2002), is reprinted in the Appendix at A1-A26 ("App.").

JURISDICTION

The Missouri Supreme Court entered its judgment on December 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person . . . snall be compelled in any criminal case to be a witness against himself . . . .

INTRODUCTION AND STATEMENT

This case seeks to clarify whether the bright-line rule established in *Oregon v. Elstad*, 470 U.S. 298 (1985), "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." is applicable in cases where the initial failure to advise the suspect of his *Miranda* rights was intentional.

Ever since this Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted into evidence, there has been an ongoing debate over the application of that rule. In its most recent contribution to that debate, this Court clarified that *Miranda* was a "constitutional decision" of the Court, and that it could not be overruled by an act of Congress. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

While this Court has adhered to the core holding of *Miranda*, this Court has simultaneously limited its impact in various circumstances. For example, in *Harris v. New York*, 401 U.S. 222 (1971), this Court held that while voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case in chief, the presumption of coercion mandated by the bright-line rule of *Miranda* does not bar the use of such statements for impeachment purposes on cross-examination.

Directly pertinent here is another limit on the exclusionary rule of *Miranda*: the holding in *Oregon v. Elstad*. There, this Court held that an initial failure of law enforcement officers to administer the *Miranda* warnings, without more, did not "taint" (and render inadmissible) admissions made after the suspect had later been fully advised of and had waived his *Miranda* rights. 470 U.S. at 318. In other words, the "fruit of the poisonous tree" doctrine, developed in Fourth Amendment jurisprudence, did not apply to the same extent to the Fifth Amendment rights protected by *Miranda*. 470 U.S. at 305-307.

Not surprisingly, *Elstad* and other decisions interpreting *Miranda* have had an impact on law enforcement practices across the nation. And, while law enforcement officers have generally come to terms with the need to administer *Miranda* warnings, various techniques have been developed to overcome the perceived "obstacles" created by *Miranda*. One strategy, which can yield various types of fruit, is to question suspects "outside *Miranda*." *See* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999).

The reason for questioning suspects "outside *Miranda*" is simple: rather than allowing suspects to terminate non-coercive interviews by invoking their rights, law enforcement officers have recognized that, while not admissible at trial, such non-coerced statements can lead to beneficial, and admissible,

derivative evidence. *See e.g. Michigan v. Tucker*, 417 U.S. 433 (1974) (testimony of a witness whose identity was discovered as the result of an otherwise voluntary statement taken from the accused without the benefit of full *Miranda* warnings was not excluded as fruit of the poisonous tree). Alternatively, even if not admissible in the state's case in chief, under *Harris* such voluntary statements taken in violation of *Miranda* can nevertheless be used for impeachment in the event that the suspect later testifies at trial.

Relying on this Court's holding in *Elstad*, some law enforcement officers use an interrogation strategy designed to obtain information in two stages: first, the suspect is questioned without being advised of his *Miranda* rights; and second, once an admission has been obtained (i.e., once the "cat is out of the bag"), the suspect is carefully advised of his *Miranda* rights and questioned again. Then, at trial, only the second confession (if one is obtained) is used against the accused. This technique roughly approximates what occurred in *Elstad*.

And it is the technique that troubled the Missouri Supreme Court here, where respondent was convicted of murder in the second degree for her role in arranging to burn down her mobile home, with a man inside, to cover up the death of her son (who had apparently died of neglect for which respondent might have been blamed). App. at A2.

Five days after the fire, respondent was arrested and taken to the police station, where she was placed in an interview room. App. at A3. A few minutes later, she was subjected to custodial interrogation without being given the *Miranda* warnings. App at A3. During the 40-minute interview, she made incriminating statements about her involvement in the murder. App. at A3.

After a fifteen- to twenty-minute break, the respondent was carefully advised of her *Miranda* rights. App at A3. She indicated that she understood her rights, she signed a waiver form, and she indicated that she wanted to talk to the police. App. at A3. Then she again made incriminating statements. App. at A3-A4.

At a pre-trial suppression hearing, the interviewing officer candidly admitted that he had used a two-stage interrogation technique to obtain respondent's confession. App. at A4-A5. He further testified that he had been trained at a "national" institute to use such a technique. App. at A4. Respondent did not testify at the suppression hearing, and her efforts to have the second, warned confession suppressed were unsuccessful. App. at A4-A5.

On appeal, while recognizing that the initial confession had not been actually coerced in the traditional sense, respondent argued that the second confession nevertheless should have been suppressed as "fruit of the poisonous tree" because the officer had intentionally withheld the *Miranda* warnings. *See* App. at A1, A6-A7.[1] Respondent thus argued, despite the rule in *Elstad*, that the "fruit of the poisonous tree" doctrine should apply in the *Miranda* context in those instances where an officer intentionally does what the officer in *Elstad* did, *i.e.*,

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[1] The Missouri court did not expressly outline respondent's claim in its opinion; rather, it simply identified the question that respondent's claim posed: "whether a law enforcement officer's intentional violation of *Miranda* . . . in obtaining a statement requires suppression of a second statement, secured after a *Miranda* warning was given, where the second statement was based on the first." App. at A1. That respondent's first statement was not actually coerced in the traditional sense was revealed by the Missouri court's identifying it as carrying a "presumption" of coercion arising out of the initial failure to advise respondent of her *Miranda* rights. App. at A1.

begins questioning before giving the *Miranda* warnings. *See* App. at A1, A6-A7.

A four-judge majority of the Missouri Supreme Court agreed with respondent and applied the "fruit of the poisonous tree" doctrine. App. at A7-A9. The majority said that there was "no intentional violation of *Miranda* in *Elstad*," and held that intentionally deferring the *Miranda* warnings removed this case from the *Elstad* rule. App. at A7-A9. The majority then concluded, based upon the connection between the two confessions in time, place, and content, that the "taint" from the absence of *Miranda* warnings had not dissipated prior to respondent's second confession. App. at A9-A13.

Three judges dissented, pointing directly to *Elstad*. App. at A15. The dissent would apply the *Elstad* holding as this Court wrote it, declining to create an exception based upon the subjective intent of the questioning officer. App. at A15-A21. That difference of opinion reflects a conflict among the courts on that very question of such an exception – a conflict that reduces to rubble one of the "concrete constitutional guidelines" developed in *Elstad*, that this Court had given "law enforcement agencies and courts to follow." *Miranda v. Arizona*, 384 U.S. at 441-442.

REASONS FOR GRANTING THE WRIT

I. *Miranda* and its progeny create clear and consistent constitutional guidelines, which include the holding in *Elstad* that a suspect's uncoerced responses to pre-*Miranda*-warning questioning do not preclude the introduction of later, post-warning answers.

The rule in *Miranda v. Arizona* serves a constitutional purpose, *see Dickerson v. United States*, 530 U.S. 428 (2000), and provides a bright-line rule governing the admissibility of confessions. In *Dickerson*, this Court reviewed its *Miranda* jurisprudence, noting that in *Miranda* itself. the Court had sought "'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 435, quoting *Miranda*, 384 U.S. at 442. It is the specificity of the *Miranda* rule that makes it workable in the practical world of law enforcement:

> Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity . . . benefits the accused and the State alike . . . .

Fare v. Michael C., 442 U.S. 707, 718 (1979).

Chief Justice Burger warned against holdings that might defeat the court's success in creating a specific rule that is "reasonably clear" and accessible to law enforcement officers. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). He decried the "introduc[tion of] new elements of uncertainty." *Id.*

This Court has heeded that warning and refused to return to alternatives that would be "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a

consistent manner." *Dickerson*, 530 U.S. at 444. At least until the dispute that brings us here, the Court has succeeded in retaining "concrete constitutional guidelines." But the *Miranda* bulwark, though "concrete," is not entirely straight. Among the "concrete" guidelines are "several exceptions to *Miranda's* warnings requirement." *Id.* at 437. And among the precedents this Court cited in *Dickerson* as an "exception" was *Oregon v. Elstad*, 470 U.S. 298 (1985).[2] *Id.* at 441.

In *Elstad*, the Court rejected efforts to import the Fourth Amendment "fruit of the poisonous tree" doctrine wholesale into *Miranda's* Fifth Amendment context. The Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda

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[2] Various courts have addressed whether *Elstad* survived this Court's decision in *Dickerson* – a question that is necessarily a prerequisite to the one posed in this petition. But, relying upon the discussion of *Elstad* in *Dickerson*, those courts have consistently held that *Elstad* did survive. *See United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002) (concluding that *Elstad* survived, but questioning the scope of its application to different kinds of derivative evidence and ultimately deciding that derivative physical evidence will not be excluded when the *Miranda* violation was negligent) (petition for certiorari filed October 7, 2002); *United States v. DeSumma*, 272 F.3d 176 (3rd Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002) (concluding that *Elstad* survived, and holding that the "fruits" doctrine would not operate to exclude derivative physical evidence); *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002), *cert. denied*, 122 S.Ct. 2606 (2002) (concluding that *Elstad* survived, and holding that the "fruits" doctrine would not operate to exclude derivative physical evidence); *United States v. Orso*, 275 F.3d 1190 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 125 (2002) (stating that *Elstad* is still good law, and concluding that a second, warned confession is admissible after a *Miranda* violation) (O'Scannlain, J. concurring in the denial of full court en banc rehearing); *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002) (concluding that *Elstad* survived in a "fundamentally altered" landscape, but concluding that derivative physical evidence must be excluded if it is obtained after a *Miranda* violation) (petition for certiorari filed February 12, 2003).

warnings." 470 U.S. at 318. Thus, by the time this Court observed in *Dickerson* that "*Miranda* has become embedded in routine police practice," 530 U.S. at 443, the *Elstad* holding was an integral part of the *Miranda* package.

"Routine police practice" has thus been developed on the premise that, as held in *Elstad*, pre-*Miranda* questioning does not preclude the use of later admissions unless the initial questioning was both unwarned and actually coerced. And it has been developed on the premise that whether the initial questioning was unwarned and actually coerced is judged by objective facts, not by subjective intent. That is, like the application of the core holding in *Miranda*, the application of *Elstad* can be judged by a court based entirely upon the circumstances of the questioning, without exploring the vagaries of subjective intent. Law enforcement personnel thus have developed "routine police procedures" that avoid actual coercion – not procedures governed by the fleeting uncertainties of subjective intent.

II. The appellate courts have reached conflicting decisions – and thus have given law enforcement officers and trial courts conflicting instructions – regarding whether there is an "intent" exception to the rule in *Elstad*.

Until recently, *Elstad* appeared to define a specific limit to the application of *Miranda*'s "concrete" exclusionary wall. The decision of the Missouri Supreme Court demonstrates that *Miranda*'s wall is breaking up at the *Elstad* point. But the Missouri court did not strike the first blow. The damage began earlier, with a split among federal circuit courts which arose when the circuits analyzed *Elstad* in light of the interrogating officer's subjective intent. If this breach is not repaired, the "concrete" guidelines in the *Elstad* portion of the *Miranda* wall will be reduced to rubble.

The Missouri Supreme Court majority relied upon analysis from *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989). There, the Eighth Circuit opined that *Elstad* did not give law enforcement officers a "green light" to withhold *Miranda* warnings until "such time as they are able to secure a confession."[3] But that dicta and the Missouri Supreme Court's holding cannot be reconciled with holdings of the First and Ninth Circuits that confessions obtained by the use of such so-called "improper tactics" are admissible under *Elstad*. *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000); *United States v. Orso*, 266 F.3d 1030 (9th Cir. en banc 2001), *cert. denied*, 123 S.Ct. 125 (2002).

In *United States v. Carter*, the defendant was subjected to custodial interrogation for an hour and a half. 884 F.2d at 369. After about fifty-five minutes, the investigators told the defendant they were looking for some missing currency and asked if they could look in his wallet. *Id.* Upon finding the missing items, the investigators continued to question the defendant, and they obtained incriminating statements. *Id.* The investi-gators then informed the defendant of his rights, and, after waiving those rights, the defendant gave a written statement. *Id.* The defendant's statements were suppressed by the trial court, and the government appealed.

The Eighth Circuit, after determining that the defendant had been subjected to custodial interrogation, turned to an analysis of *Elstad*. The court noted that in *Elstad* this Court was confronted with a "technical violation of *Miranda*" that may have arisen from "errors by the police in determining when a suspect is in custody or has had his freedom of movement significantly restrained." *Id.* at 373. Accordingly, after pointing out the

[3] The opinion in *United States v. Carter* was also divided, with the dissent stating that the second confession was admissible under *Oregon v. Elstad*.

apparently intentional failure to advise Carter of his rights and the "continuous" nature of the interrogation process, the court distinguished the case from *Elstad* and stated that the *Elstad* opinion "gave no indication that it intended to give a green light to law enforcement officers to ignore the require-ments of *Miranda* until after such time as they are able to secure a confession." *Id.* And, to support that conclusion, the Eighth Circuit pointed out that the *Elstad* opinion

> expressly rejected Justice Brennan's "apocalyptic" dissenting remonstrations that the Court's holding dealt a "crippling blow" to *Miranda* by permitting the police to withhold warnings until the end of interrogation, and abjured what it viewed as Justice Brennan's invitation to trial courts and prosecutors to distort the reasoning and holding of the Court's opinion.

Id. at 373-374.

The District of Columbia Circuit seems to have joined the Eighth Circuit on the side of the Missouri Supreme Court majority. In *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992), when confronted with a defendant who claimed that his case was controlled by the *Elstad* analysis of *Carter*, the court reiterated the salient portions of the *Carter* analysis and stated that the defendant's case was "clearly distinguishable." *Id.* at 1417-1418. The court explained that the facts of the defendant's case were largely consistent with the facts of *Elstad*, and it found "no evidence . . . of a deliberate 'end run' around *Miranda*[.]" *Id.* at 1418.

Contrariwise, the First Circuit has held that "a subjective intent by the officer to violate *Miranda*, unaccompanied by any coercive *conduct* cannot in itself undermine the suspect's free will." *United States v. Esquilin*, 208 F.3d at 321 (emphasis in original). In *Esquilin*, law enforcement officers arrested the defendant after they found a controlled substance in his motel room (which the defendant identified upon questioning). *Id.* at

317. The arresting officer did not advise the defendants of his *Miranda* rights; when another officer arrived to take over the investigation, the arresting officer told the new officer that the defendant had not been advised of his rights. *Id.* The new officer did not advise the defendant of his rights, and he questioned the defendant and obtained incriminating statements. *Id.* At that point, the officer advised the defendant of his rights, and the defendant made a detailed confession. *Id.* Only the defendant's post-*Miranda* confession was admitted at trial. *Id.* at 318-319.

On appeal, the court held that the post-*Miranda* statement was properly admitted under *Elstad*. *Id.* The court rejected the defendant's claim that the continuous nature of his interrogation distinguished his case from *Elstad*, pointing out that "[a]ccording to *Elstad*, the lapse of time between interrogations is relevant only when the statement obtained in violation of *Miranda* was actually coerced." *Id.*[4] The court further held that an officer's subjective intent to purposely violate *Miranda* is not an "improper tactic" (because it is not actually coercive) and that the officer's subjective intent did not alter the *Elstad* analysis (because *Elstad* held that failure to advise does not, without more, make a confession involuntary). *Id.* at 319-321. And, finally, the court rejected the defendant's argument that it should follow the Eighth Circuit's holding in *Carter* because it needed to deter such interrogation tactics, instead affirming *Elstad*'s conclusion that *Miranda*'s deterrence rationale requires no more than the suppression of any pre-*Miranda* confession.[5]

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[4] The Seventh Circuit has also held that the temporal proximity between the unwarned and warned confessions is irrelevant under *Elstad*. *See United States v. Gupta*, 183 F.3d 615, 618-619 (7th Cir. 1999).

[5] In *Esquilin*, the court noted that the analysis of *Elstad* in *Carter* appeared to be dicta, and that a portion of it was facially inconsistent with *Elstad*. *United States v. Esquilin*, 208 F.3d at 320. *See also United States v. Wiley*, 997 F.2d 378, 383 (8th Cir. 1993) (noting that *Carter*'s holding ultimately turned upon an illegal search and not its analysis of *Elstad*).

In this conclusion, the First Circuit is joined by the Ninth. In *United States v. Orso*, the defendant had been arrested and, without the benefit of *Miranda* warnings, subjected to custodial interrogation while being transported to the police station. About ten minutes after making incriminating statements, inspectors advised the defendant of her rights, and she fully confessed. *Id.* at 1033. The Ninth Circuit rejected the "improper tactic" argument and the heightened deterrence argument, and overturned a decision in which it had reached a contrary conclusion. *Id.* at 1034-1039.

Thus, in the wake of *Elstad*, courts have reached opposite results when confronted with deliberate, pre-*Miranda*-warning questioning. Only this Court can eliminate that division.

III. The confusion caused by the divide cannot be resolved by resort to *Elstad*, in which this Court turned away from evaluating subjective intent, focusing instead on objective facts of coercion.

This Court did not provide enough in *Elstad* itself from which to derive a clear answer to the courts' disagreements – or at least not to derive the Missouri Supreme Court's answer. Again, this Court held in *Elstad* "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." 470 U.S. at 318. In this case, the Missouri court did not find that respondent was subjected to actually coercive questioning prior to receiving the *Miranda* warnings. Rather, the Missouri court found that (1) the interrogating officer intentionally withheld

Miranda warnings to obtain the first confession, and (2) the interrogating officer, as part of a continuous process, used the first admission to prompt the later, warned confessions. App. at A7-A13. Relying upon those facts, the court attempted to distinguish this case from *Elstad*. *Id.* But *Elstad* cannot be distinguished on those facts.

The Missouri Supreme Court majority noted that "*Elstad* dealt with what the Court described as 'a simple failure to administer the warnings.'" App. at A7. The court further asserted that "[t]here was no intentional violation of *Miranda* in *Elstad*[.]" App. at A7. On that basis, the Missouri court distinguished this case from *Elstad* and "presume[d] the violation of *Miranda* was a tactic . . . used to weaken [respondent's] ability to knowingly and voluntarily exercise her constitutional rights." App. at A12. But nothing in *Elstad*, or in the decision this Court was reviewing, *State v. Elstad*, 658 P.2d 552 (Ore. Ct. App. 1983), supports the premise that there the failure to issue *Miranda* warnings to Elstad was inadvertent – or the converse, that the failure was intentional.

Though this Court speculated in *Elstad* as to why the officer did not initially give the *Miranda* warnings, this Court ultimately turned to the objective facts: "Whatever the reason for [the officer's] oversight, the incident had none of the earmarks of coercion." *Elstad*, 470 U.S. at 315-316. Avoiding further inquiry into the subjective intent of the officer was consistent with a long line of *Miranda* decisions by this Court resisting the urge to engage in exploration of subjective intent.[6] And

[6] *See Stansbury v. California*, 511 U.S. 318, 323-325 (1994) (an officer's undisclosed, subjective beliefs have no bearing upon *Miranda*'s objective in-custody determination); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (for purposes of *Miranda*, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Rhode Island v. Innis*, 446 U.S. at 300-302 ("the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." regardless of the "underlying intent of the police"); *Beckwith v. United States*, 425 U.S. 341, 346-347 (1976) (the fact that a suspect is the "focus" of a law enforcement investigation when questioned does not, in itself, transform questioning into custodial interrogation). *See also Whren v. United States*, 517 U.S. 806, 813 (1996) ("'the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' . . . Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.").

avoiding such an inquiry made logical sense. As this Court emphasized in *Elstad*, *Miranda* is a Fifth Amendment protection designed to eliminate compelled self-incrimination, *id.* at 306-307; and, consequently, the allegedly coercive effect of questioning people without having advised them of their rights is the same regardless of whether the failure to advise was intentional or inadvertent.

The majority of the Missouri Supreme Court also relied on the fact that respondent's first confession (which the court labeled the "breakthrough" or "beachhead" admission) was used to prompt the second, warned confession. App. at A5, A7-A8. But again, *Elstad* is not on point. There, the Court merely noted that the officers did not "exploit the unwarned admission to pressure respondent into *waiving* his right to remain silent." *Elstad*, 470 U.S. at 316 (emphasis added). That observation cannot mean that officers in possession of a suspect's "guilty secret" are foreclosed from mentioning that "secret" during subsequent interrogation, where the suspect is advised of and – without "pressure" – waives his rights.

This Court specifically rejected the "cat out of the bag" argument that "voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." *Id.* at 312. The Court thus showed, to use another metaphor, that officers are not prohibited from mentioning the "elephant in the middle of the room," so long as they do not pressure the suspect to induce a *waiver* of his *Miranda* rights. But that does not provide a bridge across the divide among the courts on the impact of an officer's subjective intent – whether he learned of the "elephant" deliberately or inadvertently – when considering the admission of statements made after the *Miranda* warnings.

IV. By eroding the value of the *Elstad* rule as a "concrete constitutional guideline for law enforcement agencies and courts to follow," the divide among the courts will sow confusion and inequity throughout the country.

The result of the divide between the Missouri/Eighth Circuit rule and the First/Ninth Circuit rule is both inequity and confusion. Suspects in the First and Ninth Circuits can avoid having to face their post-*Miranda*-warning statements at trial only if they can show that the objective circumstances of the pre-*Miranda*-warning questioning were coercive. Suspects in Missouri, and perhaps in the Eighth and D.C. Circuits, can prevent the introduction of their post-*Miranda*-warning statements at trial even if the objective circumstances of the pre-*Miranda*-warning questioning were *not* coercive, provided they can persuade the trial court that the officer's subjective intent was improper. Suspects in other states and circuits have no idea what the current rule is.

Neither, of course, do law enforcement officers. And law enforcement officers recognize the value of questioning

suspects "outside *Miranda*." They know that such strategies are likely to yield other types of fruit that can both further an investigation and be used at trial.[7] Thus many law enforcement officers, absent concrete, consistent, constitutional guidance, will continue to push the limits of *Miranda* and *Elstad*. Those attempts will raise, throughout the country, the issue on which the courts are so clearly divided.

That result is assured not just because it is logical to use the approach used here, but because there are already nationwide efforts to encourage officers to do so. The officer in this case testified that a "national" institute had trained him to use the two-stage interrogation technique that elicited respondent's confession. This Court can be assured that other officers are receiving the same kind of training.[8] A website for the

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[7] Even the Missouri Supreme Court acknowledged that there were possible benefits to be gained by questioning suspects "outside *Miranda*" when it stated that the risk of exclusion under *Miranda* "may be weighed against the desirability of getting information, such as the names of witnesses or location of physical evidence." App. at A8-A9. Thus, it appears that the Missouri court is not yet questioning the validity of *Michigan v. Tucker*, 417 U.S. 433 (1974).

[8] The officer may have been referring to the Reid Institute when he testified that he had been trained at a "National Law Police Institute." The Reid Institute conducts training seminars throughout the nation and licenses its interrogation techniques to other training organizations. *See* www.reid.com (available March 4, 2003) and www.w-z.com (the website for Wicklander-Zulawski and Associates, Inc., a company that offers training in the Reid interrogation techniques) (available March 4, 2003). Though not clearly an example of a two-stage interrogation technique, the following testimonial from the Wicklander-Zulawski website suggests that the two-stage interrogation technique is being taught:

> Once on the property, I did apprehend the subject, who of course denied the crime. I used some theories already learned in the class on Thursday, and directly put them to use. Within ten minutes, I had a full verbal confession, *followed by a secured* written confession. Again this type of incident is rare at my property, and

Behavior Analysis Training Institute, which trains officers in interrogation techniques, has a "Legal" webpage that discusses cases bearing upon interrogation strategies. The Institute briefly outlines the Ninth Circuit's decision in *United States v. Orso*, followed by this telling comment:

> Proper [sic] conducted attenuation principles are alive and well (*Oregon v. Elstad*, U.S., 1985). A first unwarned statement can be rehabilitated at a later time by a second, attenuated statement. In *Elstad* there was a two hour break between the first, unwarned statement at the defendant's home and second, Mirandized statement at the police station. U.S. ruled: "When neither the initial or subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the fact-finder".

See www.liedetection.com (available March 4, 2003). Though this comment suggests a somewhat less than full understanding of *Elstad* (inasmuch as it seems to rely primarily upon a taint-and-dissipation analysis), it nevertheless teaches law enforcement officers that, when properly conducted, the practice of questioning suspects without advising them of their *Miranda* rights is "alive and well."

As such training reaches more and more law enforcement officers, the wide divide among the courts will not narrow, and the number of courts on each side of the divide will increase. Meanwhile, suspects, law enforcement officers, and courts will struggle with the choice the conflicting decisions pose. Someone will be unduly disadvantaged – either the suspect who

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> my General Manager was very impressed with our results. The Director of Engineering was also standing by during questioning as a witness, and she could not believe how my new learned techniques worked.

See www.w-z.com/tales_3.htm (emphasis added) (available March 4, 2003).

cannot argue intent as an element to preclude application of the *Elstad* rule, or law enforcement efforts aimed at finding and convicting criminals. This Court should grant the petition and resolve the conflict.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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March 10, 2003

APPENDIX

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STATE OF MISSOURI,
Respondent,

v.

PATRICE SEIBERT,
Appellant.

No. SC84315

SUPREME COURT OF MISSOURI

93 S.W.3d 700

December 10, 2002.

Michael A. Wolff, Judge.

The question presented here is whether a law enforcement officer's intentional violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), in obtaining a statement requires suppression of a second statement, secured after a *Miranda* warning was given, where the second statement was based on the first. Essential to this inquiry is whether the presumption that the first statement was involuntary carries over to the second statement. In the circumstances here, where the interrogation was nearly continuous, the Court holds that the second statement, clearly the product of the invalid first statement, should have been suppressed.

Patrice Seibert was convicted of second-degree murder for her role in the death of Donald Rector in a fire intentionally set in the mobile home where Rector resided. She was sentenced to life imprisonment. On appeal, Seibert asserts the trial court

committed reversible error when it allowed the State to introduce inculpatory statements she made while in custody. Seibert did not testify at trial.

After opinion by the Court of Appeals, Southern District, this Court granted transfer. This Court has jurisdiction. MO. CONST. art. V, section 10. The judgment of the trial court is reversed, and the case is remanded.

Facts - The Mobile Home Fire and Death of Donald Rector

Seibert lived in a mobile home in Rolla with her five sons. The victim, Donald Rector, 17, who was on medication for a mental disorder, also lived with them. Jonathan, 12, one of Seibert's sons, was seriously handicapped with cerebral palsy. He could not walk, talk or feed himself. On February 12, 1997, Jonathan died in his sleep. Seibert was afraid to report his death. He had bedsores, and she was afraid authorities would believe she had been neglecting him.

In Seibert's presence, two of her teen-aged sons and two of their friends discussed a plan to set the mobile home on fire to cover up Jonathan's death. They decided Donald should be present in the fire so it would not look as though Jonathan had been left alone. In her statements, Seibert admitted that Donald, who died in the fire, was supposed to die in the fire. According to the trial testimony of Jeremy, one of her son's friends, Seibert was crying, "pretty much in hysterics," during the discussion with her two sons and their friends. She suggested sending her two younger sons, Patrick and Shawn, to church during the fire. Seibert was not present when the fire started.

Darian, age 17, the oldest of Seibert's sons, and his friend Derrick were to set the fire. Darian testified that Derrick poured gas around the trailer and then hit Donald, who was having a seizure and convulsing on the floor. Derrick set the fire before

Darian was out of the trailer. Darian suffered serious burns to his face. Donald's dead body was found kneeling in front of and partially lying on a sofa in the west bedroom with a penetrating wound on the back of his skull. The cause of death was asphyxiation secondary to exposure to fire.

The Two-Step Interrogation

On February 17, 1997, five days after the trailer fire, St. Louis County officer Kevin Clinton woke Seibert at 3:00 a.m. She was at a hospital in St. Louis County, where Darian was being treated for burns. Rolla officer Richard Hanrahan arranged for Officer Clinton to arrest Seibert. Officer Hanrahan specifically instructed Officer Clinton not to advise Seibert of her *Miranda* rights.

Once at the police station, Seibert was left in a small interview room for 15 to 20 minutes to "give her a little time to think about the situation." Without issuing a *Miranda* warning, Officer Hanrahan then questioned her for 30 to 40 minutes. He squeezed her arm and repeated the same statement, "Donald was also to die in his sleep," throughout much of the interview. After she made an admission indicating that she knew Donald was to die in his sleep, she was given a 20-minute break for coffee and a cigarette. Officer Hanrahan then resumed the interview, this time using a tape recorder, and advised Seibert of her *Miranda* rights. Seibert signed a waiver form.

Officer Hanrahan began the second stage of the interview by referring to the first stage: "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" Then, with occasional reference back to the first stage, pre-*Miranda* interview, Officer Hanrahan continued to question Seibert. She repeated statements she had made prior

to receiving *Miranda*. This tape-recorded interview was played

to the jury at trial.

Officer Hanrahan testified that he made a conscious decision to withhold *Miranda* hoping to get an admission of guilt. He testified that an institute, from which he has received interrogation training, has promoted this type of interrogation "numerous times" and that his current department, as well as those he was with previously, all subscribe to this training. In the second stage of the interview, Officer Hanrahan began by reminding Seibert that they had been "talking for a little while" about the trailer fire, which occurred on February 12. Thus, he was able to link together the unwarned interview with the warned interview. Seibert was reminded of the statements she made during the first stage, which occurred before he gave Seibert a *Miranda* warning. He also used Seibert's pre-warning statements to phrase his questions. For example, consider the following excerpt from the second stage of the interview (emphasis added):

Officer Hanrahan: Now, in discussion you told us, you told us that there was an understanding about Donald. (Here, he is referring to the unwarned portion of the interview.)

Seibert: Yes.

Hanrahan: Did that take place earlier that morning [February 12, 1997]?

Seibert: Yes.

Hanrahan: Ok. And what was the understanding about Donald?

Seibert: If they could get him out of the trailer, to take him out of the trailer.

Hanrahan: And if they couldn't?

Seibert: I, I never even thought about it. I just figured they would.

Hanrahan: Trice, didn't you tell me that he was supposed to die in his sleep?

Seibert: If that would happen, 'cause he was on that new medicine, you know . . . .

Hanrahan: The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?

Seibert: Yes.

Officer Hanrahan, in order to secure an admissible confession, used information he gained from Seibert's previous inadmissible confession. As a result, Seibert's post-warning statements were closely tied to the lengthy unwarned interrogation.

The Purpose and Protections of *Miranda*

To preserve the Fifth Amendment right against self incrimination where an accused is subjected to custodial interrogation, which "exacts a heavy toll on individual liberty and trades on the weakness of individuals," the United States Supreme Court created the now well-known safeguard: the *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436, 455, 16 L. Ed. 2d 694, 86 S. Ct. 1602. *Miranda* provided that, "prior to any questioning" a person must be informed of certain rights, including the right to remain silent, which can only be waived

knowingly, voluntarily and intelligently. *Id.* at 444 (emphasis added).[1]

The *Miranda* requirement serves several purposes. "For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." 384 U.S. at 468. Beyond providing these protections, the *Miranda* decision and its progeny serve to guide police and deter improper conduct.[2] The Supreme Court granted certiorari in *Miranda* to "give concrete constitutional guidelines for law enforcement agencies and courts to follow."

Failure to give a *Miranda* warning does not result in exclusion of a statement for all purposes. An unwarned custodial statement may be used for impeachment. *Harris v. New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971). The prosecution may use the testimony of a witness who was identified by the defendant in a statement given without a *Miranda* warning. *Michigan v. Tucker*, 417 U.S. 433, 444, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974). And, most pertinent to this case, the Court in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed. 2d 222, 105 S. Ct. 1285 (1985), held that a defendant's prior remark, in answer to a question during the police investigation,

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[1] The United States Supreme Court has held that the protection is derived from the Constitution and, thus, not subject to legislative repeal and reaffirmed its applicability to the states. *Dickerson v. United States*, 530 U.S. 428, 438-39, 434, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000).

[2] "Miranda has had a tremendously shattering impact upon all levels of the police profession and is, unquestionably, the most significant, far-reaching, and all-encompassing decision in the broad field of criminal justice ever handed down." ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 310 (3d ed. 1980).

does not - "without more" - make a subsequent statement inadmissible after a *Miranda* warning was given. *Elstad*, 470 U.S. at 300, 309.

As *Elstad* and *Tucker* reiterate, the goals of *Miranda* are to deter improper police conduct and to assure trustworthy evidence, specifically evidence that has not been obtained in circumstances that appear to be coercive. *Elstad* dealt with what the Court described as "a simple failure to administer the warnings." 470 U.S. at 309. There was no intentional violation of *Miranda* in *Elstad*, and the Court held "the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*

But what about circumstances such as this case where the violation of *Miranda* was intentional? An intentional violation of *Miranda* shifts the focus from the goal of gaining trustworthy evidence - though that is still a major concern - to the goal of deterring improper police conduct.

Intentional *Miranda* Violations

The police officer in this case purposefully withheld a *Miranda* warning as part of a two-step interrogation technique designed to elicit an initial confession before reading the accused her rights, hoping that she would repeat that confession. As noted, Officer Hanrahan testified that he made a conscious decision not to advise Seibert of her rights because he was hoping to get an admission from her and specifically asked the arresting officer not to give a *Miranda* warning. Officer Hanrahan characterized the strategy as follows:

Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the Miranda rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went

forward with the second stage, read Miranda, and she repeated the items she had told us.

Securing a first admission - no matter how small - is often called the "breakthrough" or "beachhead".[3] Interrogators are taught that procuring the first admission is the "biggest stumbling block" that, once overcome, usually leads to a full confession. "The subject must be motivated to make the first admission, no matter how apparently small or trivial," according to ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 290 (3d ed. 1980). "If this admission is related to the crime and to the subject matter of the interrogation, there is every reason to expect that the first admission will lead to others, and eventually to a full confession."

Once the officer has the initial admission, the officer uses "skillfully applied interrogation techniques" to "motivate the suspect into making the confession." *Id.* at 26. One of these techniques is to confront the suspect with the earlier admission, which is what occurred in this case.

If a *Miranda* warning precedes the interrogation, this is a perfectly legitimate technique. But in this case, the interrogation proceeded without the required warning, and then after the first admission was made, only a short break and then a *Miranda* warning interrupted the interrogation.

This was undeniably an "end run" around *Miranda*. When an officer chooses to use this tactic, the officer should, under *Miranda*, understand the risks of doing so. The biggest risk is that the prosecution may not be able to use the statement in its

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[3] See ROBERT F. ROYAL & STEVEN R. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION 143 (1976).

case in chief. That risk, of course, may be weighed against the desirability of getting information, such as the names of witnesses or location of physical evidence. And it may well be, under circumstances that differ from those in this case, that the prosecution may nevertheless be able to show that the confession was voluntary despite the *Miranda*-based presumption to the contrary.

Voluntariness of the Subsequent Admission

Upon finding an intentional *Miranda* violation, a court must ascertain whether the warned statement was voluntary. In doing so, the court examines the facts and circumstances to "determine the degree of causal connection between any unconstitutional conduct (and the statement resulting therefrom) and the confession made later." *State v. Fakes*, 51 S.W.3d 24, 30 (Mo. App. 2001) (citing *State v. Wright*, 515 S.W.2d 421, 426 (Mo. banc 1974)). The court should ascertain whether the purpose of the violation was to "undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 309.

In light of the record in this case, this Court presumes the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights. If the truth were otherwise, Officer Hanrahan would not have specifically instructed the arresting officer to refrain from giving a *Miranda* warning. He wanted to secure a "breakthrough" admission before warning Seibert of her rights because he feared that she would assert those rights were she made aware of them.

Another important consideration in determining voluntariness is the proximity in time and place of the subsequent confession. If the warned confession is far enough removed from the first confession, the accused more likely made a voluntary decision to speak again. While each situation

is fact-specific, courts can look to whether the subsequent confession closely followed the first and was obtained by the same officials in the same surroundings. For example, in the case at bar, Seibert was questioned for 30 to 40 minutes, in an intense manner. She became emotional during the interview and, at one point, Officer Hanrahan squeezed her arm and repeatedly stated, "Donald was to die in his sleep." He continued in this manner until Seibert agreed that Donald was supposed to die in the fire. Then, after a 20-minute break, Seibert was read and waived her *Miranda* rights. The same officers interrogated her in the same room only minutes after her unwarned confession. It was at this point that she confirmed her unwarned statements.

In these circumstances, little if any weight can be given to the fact that Seibert signed a *Miranda* waiver.[4] In *State v. Fakes*, the court of appeals suppressed a similar confession. Fakes was interrogated at length while at the police station before receiving the *Miranda* warning. The interrogation was intense, and officials did not give Fakes a *Miranda* warning until she became emotional. *Fakes*, 51 S.W.3d at 32. In suppressing Fakes' post-*Miranda* confession, the court questioned the voluntariness of Fakes' *Miranda* waiver: "In view of the fact that she was so extensively interrogated before she was advised of her rights, it is not as clear as in *Wright* and *Elstad* that she later voluntarily waived those rights when, after finally having been advised of her rights, she confirmed the statements made earlier." *Id.* at 33. In situations such as these, where the accused is subjected to a nearly continuous period of

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[4] This is true even though Officer Hanrahan read each part of *Miranda* to Seibert, having her orally express her understanding of each right independently and then instructing her to initial and sign a waiver form. Adherence to such formality 30 minutes into the interrogation does not change the fact that she was subjected to a nearly continuous interrogation, which began without a proper *Miranda* warning.

interrogation, it is unreasonable to assume - and there is nothing in the record to support such an assumption - that the simple recitation of *Miranda* would resurrect the opportunity to obtain a voluntary waiver.

The Eighth Circuit, in *United States v. Carter*, suppressed a written confession, which was executed after an initial unwarned interrogation that was followed by a *Miranda* warning. In *Carter*, postal inspectors interrogated the suspect, without giving the *Miranda* warning, about his alleged possession of stolen mail for nearly an hour before he confessed. The interrogation took place in the bank president's office, in the building where Carter worked, with Carter seated between the two inspectors. *United States v. Carter*, 884 F.2d 368, 372 (8th Cir. 1989). The court found the second warned confession "came almost directly on the heals" [sic] of the first unwarned confession and that the unwarned confession, subsequent warnings and confession were "part and parcel of a continuous process." *Id.* at 373.

When presented with different circumstances, the result may be different. In *Wright*, for example, the accused was brought into the interrogation room while the officer was questioning another suspect. Without first advising Wright of his constitutional rights, the officer asked him, "What did you do with the shotgun?" or words to that effect. Wright replied, "Leroy, you know I gave you the shotgun. I don't know where it is at." The officer advised Wright not to make any further statements. Wright was then placed in juvenile custody. *Wright*, 515 S.W.2d 421, 423 (Mo. banc 1974). In finding that Wright's subsequent statements were not coerced, the court noted the second interrogation was held the following day, at a different location (the juvenile building instead of the police station), and with different people present (Wright's mother and juvenile officers). *Id.* at 427.

Elstad also is distinguishable in that there was no evidence, as in the instant case, that the breach of *Miranda* was part of a premeditated tactic to elicit a confession. "The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect, but to notify his mother of the reason for the arrest." *Elstad*, 470 U.S. at 315. The *Elstad* court did not find that the police engaged in "improper tactics".

Here, however, Officer Hanrahan candidly admitted that the breach of *Miranda* was intentional and part of a tactic to elicit a confession. It is presumed that this strategy was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights. Further, a 20-minute break and *Miranda* warning separating the unwarned confession from the warned confession was not enough to disturb the continuity of the interrogation where Officer Hanrahan tied the two stages of the interview together by using her statements in the first stage to correct her during the second stage.

Officer Hanrahan's intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights. Both stages of the interview formed a nearly continuous interrogation - she was interrogated by the same officials in the same place with only minutes separating the unwarned and warned questioning. There are no circumstances that would seem to dispel the effect of the *Miranda* violation. For these reasons, Seibert's post-*Miranda* waiver and confession was involuntary and, therefore, inadmissible. To hold otherwise would encourage future *Miranda* violations and, inevitably, *Miranda*'s role in protecting the privilege against self- incrimination would diminish. Were police able to use this "end run" around *Miranda* to secure the all-important "breakthrough" admission, the requirement of a warning would be meaningless. Officers would have no incentive to warn, knowing they could

accomplish indirectly what they could not accomplish directly.[5] Almost twenty years ago, in his *Elstad* dissent, Justice Brennan predicted in what the *Elstad* majority described as an "apocalyptic tone" that *Elstad* would deliver a "crippling blow" to *Miranda*. *Elstad*, 470 U.S. at 318 n.5, 319. Brennan warned that *Elstad* gave authorities "every incentive . . . to interrogate suspects without warnings or an effective waiver, knowing that the fruits of such interrogations 'ordinarily' will be admitted, that an admissible subsequent confession 'ordinarily' can be obtained simply by reciting the *Miranda* warnings shortly after the first has been procured and asking the accused to repeat himself . . . ." *Id.* at 358. And, as evidenced by the testimony of officer Hanrahan, officers not only have incentive to intentionally interrogate suspects without administering *Miranda* - they are being trained to do so. The *Elstad* majority, however, said Brennan's apocalyptic prediction - which is what happened in this case - would not result. "Justice Brennan not only distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same." *Id.* at 318 n.5.

Prejudice

Because the trial court erred in admitting Seibert's post-*Miranda* confession, the case should be reversed and remanded for a new trial unless the error was harmless. *State v. Miller*, 650 S.W.2d 619, 621 (Mo. banc 1983). Seibert was convicted of second degree murder as an accessory for knowingly killing Donald Rector. The jury was able to both read and hear her statements that she knew the mobile home was to be burned and that Donald could die in his sleep because he was on Prozac. At one point, she agreed with Officer Hanrahan that Donald

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[5] See Robert M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579, 620 (1968).

was supposed to die in his sleep after he reminded her of her pre-*Miranda* confession. Because of the evidentiary strength of a confession,[6] and because of the contents of Seibert's involuntary statements, her statements certainly were not harmless.

Conclusion

The interrogation was set up to violate *Miranda* to secure a confession. The trial court suppressed only the unwarned portion of the interrogation. But on this record, the prosecution has not overcome the presumption that this tactic produced an involuntary confession. The confession in the remaining portion of the interrogation also should have been suppressed.

The judgment is reversed, and the case is remanded for a new trial.

Michael A. Wolff, Judge

White, Stith and Teitelman, JJ., concur;

Benton, J., dissents in separate opinion filed;

Limbaugh, C.J., and Price, J., concur in opinion of Benton, J.

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[6] "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" *Arizona v. Fulminante*, 499 U.S. 279, 296, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968) (White, J., dissenting)).

DISSENTING OPINION

Because the principal opinion does not follow the binding precedent, *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), I dissent.

Elstad holds that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving [her] rights and confessing after [she] has been given the requisite *Miranda* warnings." *Elstad*, 470 U.S. at 318, 105 S. Ct. at 1298, 84 L. Ed. 2d at 238. Patrice Seibert's unwarned responses to Officer Hanrahan's questioning did not prevent her from waiving her rights and confessing.

"In these circumstances [where the preceding admission is unwarned but voluntary], a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." *Elstad*, 470 U.S. at 310-311, 105 S. Ct. at 1294, 84 L. Ed. 2d at 233. In this case, the administration of *Miranda* warnings was careful and thorough, as demonstrated by the tape recording of the administration, and by the form that Seibert initialed, dated and signed. As in *Elstad*, the reading of Seibert's rights was undeniably complete and recorded. *Elstad*, 470 U.S. at 314-315, 105 S. Ct. at 1296, 84 L. Ed. 2d at 236. Moreover, Seibert was 39 years old when she confessed. Appendix A to this opinion is the "Warning & Waiver Form." Appendix B is the testimony discussing it.

"A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Elstad*, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235. The *Miranda* warnings given Seibert "ordinarily" should make her later confession admissible.

"Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d at 232. In this case, Seibert's unwarned admissions were suppressed. The circuit court found that the warned statement was knowingly and voluntarily made. "In reviewing preserved error relating to a trial court's order on a motion to suppress evidence, the facts and reasonable inferences from such facts are considered favorably to the trial court's ruling, and contrary evidence and inferences are disregarded." *State v. Galazin*, 58 S.W.3d 500, 507 (Mo. banc 2001).

"It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise [her] free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Elstad*, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d at 232. In this case, there was no "actual coercion" of Seibert, or "other circumstances" that undermined her free will. *Elstad* holds flatly that the "psychological impact of voluntary disclosure of a guilty secret" is not coercion, nor does it compromise the voluntariness of a subsequent informed waiver. *Elstad*, 470 U.S. at 312, 105 S. Ct. at 1294, 84 L. Ed. 2d at 234. The *Elstad* opinion disapproves such "cat out of the bag" logic as "expansive." *Id.*

"Absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Elstad*, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235. In Seibert's case, there were no deliberately coercive tactics. No firearms were produced, or shown to

Seibert during her interrogation. There were no threats in any way, nor physical or verbal abuse. The conversation was in "very low conversational tones." No inducements or promises were made. There is no evidence of deliberately coercive tactics.

The principal opinion distinguishes *Elstad*, noting that in that case there were no "improper tactics." In Seibert's case, the principal opinion finds improper tactics, when it presumes that the officer intended to deprive her "of the opportunity knowingly and intelligently to waive her *Miranda* rights."

If there were substantial evidence that the officer did the following - "inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke [her] rights once they are read to [her]" - then the warned confession should be suppressed. See *Elstad*, 470 U.S. at 317, 105 S. Ct. at 1297, 84 L. Ed. 2d at 237.

At this critical point, the majority presumes that the officer's strategy had the purpose "to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." No evidence supports this assumption. Siebert did not testify at any hearing or at trial. Officer Hanrahan testified at the hearing that his "hope" and "intent" were to gain some sort of confession or admission of guilt. The officer did not mention "breakthrough" or "beachhead" interrogation. In addition to the "rolling the dice" paragraph quoted in the principal opinion, Officer Hanrahan testified that withholding *Miranda* rights at the outset means:

A. You may not get any information at all.

Q. In which part of the interrogation?

A. In either part. You may never even get to the second stage.

Officer Hanrahan testified that based on two prior conversations with Seibert, he believed she expected to be arrested and would have a story rehearsed. Although defense counsel asked Officer Hanrahan about interrogation techniques at both the suppression hearing and the trial, the Officer - the only witness to testify about the confession - stated that his hope and intent was to gain a confession or admission.

Elstad expressly commends confessions: "Voluntary statements 'remain a proper element in law enforcement.'" *Elstad*, 470 U.S. at 305, 105 S. Ct. at 1291, 84 L. Ed. 2d at 229, quoting *Miranda v. Arizona*, 384 U.S. at 478, 86 S.Ct. at 1630. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable . . . Absent some officially coerced self-accusation, the Fifth Amendment is not violated by even the most damning admissions." *Elstad*, 470 U.S. at 305, 105 S. Ct. at 1291, 84 L. Ed. 2d at 229. "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Elstad*, 470 U.S. at 312, 105 S. Ct. at 1294-95, 84 L. Ed. 2d at 234. *Elstad* invokes cases holding confessions voluntary, even though police falsely stated that a codefendant turned State's evidence, or although the defendant did not know that a prior coerced confession could not be admitted. *Elstad*, 470 U.S. at 317, 105 S. Ct. at 1297, 84 L. Ed. 2d at 237. *See also Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (police failed to tell suspect of attorney's efforts to reach him; confession admitted, after voluntary waiver); *Oregon v. Mathiason*, 429 U.S. 492, 495-96, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1999) (police falsely told suspect his fingerprints found at scene, not *Miranda* violation). "*Miranda* forbids

coercion, not mere strategic deception . . . Ploys to mislead a suspect or lull [her] into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S. Ct. 2394, 2397, 110 L. Ed. 2d 243, 251 (1990). Placing an undercover agent near the suspect in order to gather incriminating information is permissible under the Fifth Amendment. *Hoffa v. United States*, 385 U.S. 293, 304, 87 S. Ct. 408, 414, 17 L. Ed. 2d 374, 383 (1966).

The principal opinion, in emphasizing the factors of lapse-of-time, change-of- place, change-of-interrogators, and need-to-dissipate-taint, echoes the Oregon court reversed in *Elstad*, and the other courts criticized in *Elstad*. *Elstad*, 470 U.S. at 303, 310, 317-18, 105 S. Ct. at 1290, 1293, 1297, 84 L.Ed. 2d at 228, 233, 237. *Elstad* makes clear that these factors are considered only if the first confession is coerced. *Id.*

Elstad is still binding precedent. *Elstad* was approved in *Dickerson v. United States*, 530 U.S. 428, 441, 120 S. Ct. 2326, 2335, 147 L. Ed. 2d 405, 418 (2000). The United States Supreme Court re-affirmed that the traditional "fruits" doctrine developed in Fourth Amendment cases does not apply to unwarned interrogation under the Fifth Amendment. *Id.* The holding of Dickerson is: "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickerson*, 530 U.S. at 432, 120 S. Ct. at 2329-30, 147 L. Ed. 2d at 412. This "progeny" includes the *Elstad* case, as demonstrated by *Dickerson*'s express discussion of *Elstad* (summarized above), and by *Dickerson*'s implicit approval: "If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson*, 530 U.S. at 443-44, 120 S. Ct. at 2336, 147 L. Ed. 2d at 420.

The principal opinion asserts that *Elstad* does not apply where police intentionally withhold *Miranda* warnings before the initial unwarned statement. True, *Elstad*, at one point, describes the initial unwarned statement as "technically in violation of *Miranda*." *Elstad*, 470 U.S. at 318, 105 S. Ct. at 1297-98, 84 L. Ed. 2d at 238. This passing comment in *Elstad* does not support the principal opinion, as demonstrated in recent opinions by the Courts of Appeals.

On facts nearly identical to this case, the United States Court of Appeals for the Ninth Circuit, en banc, held that *Elstad* applies so long as the initial unwarned statement is not actually coerced. *United States v. Orso*, 266 F.3d 1030, 1035, 1039 (9th Cir. en banc), *full en banc hearing denied*, 275 F.3d 1190 (2001). The United States Supreme Court denied certiorari on the Orso case, while this case was pending. _____ U.S. _____, 154 L. Ed. 2d 42, 123 S. Ct. 125 (2002).

It is also true that the Eighth Circuit has made statements to the contrary. *United States v. Carter*, 884 F.2d 368, 372-74 (8th Cir. 1989). However, yet another Circuit, the First, called Carter's statements "dicta" and "facially inconsistent with the Supreme Court's holding in *Elstad*." *United States v. Esquilin*, 208 F.3d 315, 320 (1st Cir. 2000). The First Circuit then holds that deliberate withholding of *Miranda* rights before the unwarned admission does not make a later warned statement inadmissible. *Id.* at 320-21. Directly refuting the principal opinion's reliance on "deterrence" against "improper tactics," the First Circuit holds:

Although *Elstad* does not permit suppression of Esquilin's voluntary statement made after he was informed of his *Miranda* rights and voluntarily waived them, the basic *Miranda* rule still operates here to render Esquilin's initial unwarned (but voluntary) statement inadmissible. The Supreme Court has ruled that *Miranda*'s deterrence rationale requires no more than

that, *see Elstad*, 470 U.S. at 308, 105 S. Ct. 1285, and we are not free to ignore that judgement.

Id. at 321. The *Esquilin* case also specifically holds that *Elstad* rejects the "nearly continuous" and "time lapse" arguments, both invoked by the principal opinion. *Id.* at 319.

As for the other authority the principal opinion discusses, *Elstad* renders obsolete the contrary approach in this Court's decision eleven years earlier in *State v. Wright*, 515 S.W.2d 421, 426-27 (Mo. banc 1974), and in the Court of Appeal's decision last year in *State v. Fakes*, 51 S.W.3d 24, 30 (Mo. App. 2001).

Once the questions of law are resolved, it is clear that the trial judge should be affirmed. "When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence, and deference is given to the trial court's superior opportunity to determine credibility of witnesses." *State v. Feltrop*, 803 S.W.2d 1, 12 (Mo. banc), *cert. denied*, 501 U.S. 1262, 115 L. Ed. 2d 1081, 111 S. Ct. 2918 (1991). On this record, there is substantial evidence that both the unwarned and warned statements were voluntary. Thus, under *Elstad*, the warned statement is admissible, as the trial judge ruled.

DUANE BENTON, Judge

APPENDIX A

ST LOUIS COUNTY DEPARTMENT OF POLICE

WARNING & WAIVER FORM

Before we ask you any questions, you must understand what your rights are:

"Initialed PDS" 1. You do not have to make any statement at this time and have a right to remain silent.

"Initialed PDS" 2. Anything you say can and will be used against you in a court of law.

"Initialed PDS" 3. You are entitled to consult with an attorney before any interview and to have an attorney present at the time of interrogation.

"Initialed PDS" 4. If you cannot afford an attorney, one will be appointed for you.

5. (Juvenile Suspects Only) If you are fourteen years of age or older you could be tried in court as an adult.

I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Patricia D. Seibert

Signature of Suspect

February 17, 1997

Date

4:30 a.m.

Time

I hereby certify that the foregoing Warning and Waiver was read by me to the above suspect, that the suspect also read it, and the suspect has affixed his (her) signature hereto in my presence.

Richard E. Hanrahan

Signature - Police Officer

Rodger R. Windle 1474

Witness (In the case of a juvenile suspect, the attending Deputy Juvenile Officer)

Appendix B

Trial Testimony of Officer Richard E. Hanrahan

(Excerpt of Transcript March 28, 200, Pages 917, line 18 - 920, line 15)

Q. When you arrived at the station, you had an initial conversation with her --is that correct?

A. That's correct.

Q. After that initial conversation did you inform the Defendant of her rights under the Miranda decision?

A. Yes, I did.

Q. I'd like to hand you what's been marked as State's Exhibit 37 and ask you if you can tell me what this is please?

A. Yes, sir - this is a rights advisement provided by the detective with St. Louis County that night.

Q. And was that, in fact, read to the Defendant?

A. Yes, sir, it was.

Q. And did you ask her if she understood each of those rights as you read them to her?

A. As I read them to her, I simply check-marked them when I was finished. I asked her if she understood each right.

Q. Did she indicate to you in some fashion whether she did or not?

A. Yes, she did.

Q. And what was her response in each case?

A. She indicated that she understood and she signed next to each of the rights to state that she understood.

Q. And sir, did you then read the waiver portion of the form?

A. I believe I let her read the waiver. I'd have to check my report to be sure. I usually allow the suspect to read the waiver.

Q. How does that waiver read?

A. It says - "I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of

any kind has been used against me."

Q. In fact, did you threaten the Defendant in any fashion?

A. I did not.

Q. Did you display a weapon or threaten a weapon -- I mean, you can do things that are non-verbal. Did you do anything that would be taken as threatening by the average person?

A. I don't believe so - no, sir.

Q. Did you promise the Defendant any benefit of any kind in order to induce her to speak with you?

A. The truth would make her feel much better.

Q. Was that all you said?

A. I believe so. I told her I believed that she was lying and the lie was hurting her.

Q. Sir, did you, in fact, ask her to sign that form if she understood her rights and agreed to speak with you?

A. Yes, sir, I did.

Q. And did the Defendant do so in your presence?

A. Yes, sir, she did.

Q. Would you point out her signature to the Court please?

A. (Complies)

Q. And sir, did you sign that form yourself as a witness?

A. Yes, sir. I did.

Q. And was anyone with you who also signed that form?

A. Fire Marshal Rodger Windle was also there.

Q. And are both your signatures then present on that form as witnesses to her signature and waiver of having been informed and waiving her rights?

A. Yes, sir, they are.

Q. Would you point out your signature and Officer Windle's signature please?

A. (Complies)